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No. 07-776

In the Supreme Court of the United States

MICHAEL J. KELLY, SR., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether former 18 U.S.C. 922(v)(1) (2000), which banned the manufacture, transfer, or possession of semiautomatic assault weapons, violated the Second Amendment.

2. Whether three illegal firearms in this case were lawfully seized when officers conducting a warrant-authorized search observed the firearms in "plain view."

3. Whether former Section 922(v)(1) exceeded Congress's authority under the Commerce Clause.

4. Whether the district court, in determining that particular firearms could be "readily restored" to automatic firing capability, properly relied on expert testimony demonstrating that such restoration could readily be achieved by a person with relevant technical expertise.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is not published in the Federal Reporter but is available at 2007 WL 2309761.

JURISDICTION

The judgment of the court of appeals was entered on August 14, 2007. A petition for rehearing was denied on September 11, 2007 (Pet. App. 16a-17a). The petition for a writ of certiorari was filed on December 10, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Northern District of West Virginia, petitioner Kelly was convicted on three counts of the unlawful

transfer of a firearm to a non-resident, in violation of 18 U.S.C. 922(b)(3); one count of unlawful possession of a semiautomatic assault weapon, in violation of 18 U.S.C. 922(v)(1) (2000);[1] and two counts of unlawful possession of a machinegun, in violation of 26 U.S.C. 5861(d). The district court sentenced him to 24 months of imprisonment. The government also filed a civil forfeiture action against 34 firearms, in which the district court granted the government's motion for summary judgment. See Pet. App. 3a-5a.

Kelly appealed his convictions. Six claimants for the firearms appealed the district court's grant of summary judgment in the civil forfeiture action. The court of appeals consolidated the appeals and affirmed the judgments in both the criminal and civil cases. Pet. App. 1a-13a.

1. Kelly owned the MKS gun dealership in Grafton, West Virginia. He specialized in manufacturing and distributing the MKS M-14A, a gun manufactured using receivers from decommissioned M-14 machineguns. In June 2001, Bureau of Alcohol, Tobacco, Firearms and Explosives (BATF) agents informed Kelly that the M-14 receivers that he was using constituted "machinegun[s]," as defined in 26 U.S.C. 5845(b), that Kelly was not authorized to possess. The BATF served a cease-and-desist letter on Kelly, who nevertheless continued to manufacture his firearms. Pet. App. 3a-4a.

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[1] Former Section 922(v)(1) made it unlawful for a person to "manufacture, transfer, or possess a semiautomatic assault weapon." 18 U.S.C. 922(v)(1) (2000). Under the terms of the statute in which it was originally enacted, former Section 922(v)(1) ceased to be effective on September 13, 2004. See Public Safety and Recreational Firearms Use Protection Act, Pub. L. No. 103-322, § 110105(2), 108 Stat. 2000.

On July 24, 2002, the BATF executed a search warrant at Kelly's residence, which also served as his place of business. The warrant authorized the agents to search for MKS M-14 receivers, firearms having such receivers, and various documents. BATF agent Richard Vasquez, a Firearms Enforcement Officer, accompanied the agents to Kelly's residence to help the agents identify firearms and to answer any technical questions that the agents might have. Pet. App. 4a; Gov't C.A. Br. 7.

During the search, the agents located, *inter alia*, an Uzi machinegun receiver, a Maadi semiautomatic assault rifle, and an FAL semiautomatic assault rifle. The agents brought those three firearms to Agent Vasquez. Agent Vasquez immediately observed that the Maadi and the FAL were unlawful firearms because the Maadi had a folding stock and pistol grip, and the FAL had a detachable magazine, a pistol grip, flash suppressor, grenade launcher, and bayonet lug. Agent Vasquez also immediately noticed that the Uzi had a discolored area and grinding marks on the outside of the receiver where a "bolt block" would normally be located. The Uzi receiver had originally been manufactured as a semiautomatic weapon with a bolt block to prevent it from firing automatically, *i.e.*, from operating as a machinegun. Believing that the Uzi had been illegally modified, Agent Vasquez opened the top cover of the receiver and confirmed that the bolt block had been removed, making the receiver an illegal machinegun. The agents then seized the Uzi. Pet. App. 4a; Gov't C.A. Br. 7-9; C.A. Supp. App. 44-53, 90-92.

2. The statutory definition of "machinegun" encompasses "any weapon which shoots, is designed to shoot, or can be readily restored to shoot, automatically more than one shot, without manual reloading, by a single

function of the trigger." 26 U.S.C. 5845(b). During its in rem action seeking forfeiture of 34 MKS M-14As, the government filed a motion for summary judgment, which included a videotaped deposition from BATF Agent Vasquez. To establish that the MKS M-14As (which could not shoot automatically when seized) could be "readily restored to shoot[] automatically," Agent Vasquez, during the videotaped deposition, modified one of the weapons in approximately 50 minutes so that it was capable of automatic fire. Agent Vasquez used three common tools to modify the weapon, and he testified that the spare parts used for that purpose would cost approximately $79. Petitioners presented no evidence to rebut Agent Vasquez's expert testimony. The district court granted summary judgment for the government. Pet. App. 11a, 13a.

3. The court of appeals affirmed. Pet. App. 1a-13a.

a. The court of appeals held that the seizure of the Uzi, Maadi, and FAL firearms, which were not identified in the search warrant as items to be seized, was justified under the "plain view" exception to the warrant requirement. Pet. App. 6a-7a. The court explained that "[u]nder the plain view doctrine law enforcement officers may seize an object without a warrant if (1) the officers are 'lawfully in a position from which they view an object,' (2) the object's incriminating character is 'immediately apparent,' and (3) the officers have a 'lawful right of access to the object.'" *Id.* at 6a (quoting *Minnesota* v. *Dickerson*, 508 U.S. 366, 375 (1993)). Petitioners argued that the second of those requirements was not satisfied because the illicit nature of the firearms was not immediately apparent to the agents who discovered the weapons and took them to Agent Vasquez for inspection. *Ibid.* The court of appeals rejected that contention. *Id.*

at 6a-7a. The court explained that, even if an item's illicit character is not manifest "at the precise moment" a searching officer first notices the item, the "immediately apparent" requirement of the "plain view" doctrine is satisfied so long as the illegality becomes evident in the course of the search without the benefit of information derived from an unlawful search or seizure. *Ibid.* (citing *United States* v. *Garces*, 133 F.3d 70, 75 (D.C. Cir. 1998)). The court concluded that, because the BATF agents who first observed the three guns "did not unlawfully search or seize the three weapons prior to the time Vasquez determined that they were possessed unlawfully," the seizure of the firearms was legal under the "plain view" doctrine. *Id.* at 7a.

b. The court of appeals held that former Section 922(v)(1) was a permissible exercise of congressional authority under the Commerce Clause. Pet. App. 7a-8a. The Court explained that "[t]he Commerce Clause authorizes Congress to regulate 'those activities that substantially affect interstate commerce,'" *id.* at 8a (quoting *United States* v. *Lopez*, 514 U.S. 549, 559 (1995)), and that "[t]he ban on the possession of semiautomatic assault weapons was plainly intended to reduce the flow of those weapons in interstate commerce," *ibid.* (citing *Navegar Inc.* v. *United States*, 192 F.3d 1050, 1058 (D.C. Cir. 1999), cert. denied, 531 U.S. 816 (2000)). The court further observed that "[r]egulations of intrastate activities that affect the supply or demand of a commodity are well within Congress' Commerce Clause powers." *Ibid.*

c. The court of appeals rejected petitioner Kelly's argument that the ban on semiautomatic assault weapons imposed by former Section 922(v)(1) violated his Second Amendment right to bear arms. Pet. App. 8a-9a. The court relied on circuit precedent that had "adopted

the collective rights theory, interpreting the Amendment to protect the states' right to organize and arm militias." *Id.* at 8a (citing *Love* v. *Pepersack*, 47 F.3d 120 (4th Cir.), cert. denied, 516 U.S. 813 (1995)). Because "Kelly ha[d] not made any showing that he possessed the semi-automatic assault weapons in connection with membership in a state militia," the court rejected his Second Amendment claim. *Id.* at 9a.

d. The court of appeals affirmed the district court's grant of summary judgment to the government on its forfeiture claim. Pet. App. 11a-13a. The court held that Agent Vasquez's restoration of the MKS M-14A established probable cause to believe that the seized weapons fell within the statutory definition of "machinegun." *Id.* at 11a-12a (citing 26 U.S.C. 5845(b)). The court noted that "two other circuit courts have held that the MKS M-14As sold by Kelly were machineguns under the definition in § 5845(b)." *Id.* at 12a (citing *United States* v. *One TRW, Model M14, 7.62 Caliber Rifle*, 441 F.3d 416 (6th Cir. 2006), and *United States* v. *TRW Rifle 7.62X51MM Caliber*, 447 F.3d 686 (9th Cir. 2006)). The court of appeals further observed that Kelly had not offered evidence to rebut Agent Vasquez's testimony, or to show that the process of converting the MKS M-14As to automatic firing capability would be difficult, time-consuming, or expensive. *Id.* at 13a.

DISCUSSION

1. Petitioners contend (Pet. 10-11) that former 18 U.S.C. 922(v)(1) (2000), which banned private possession of semiautomatic assault weapons, violated the Second Amendment. Because former Section 922(v)(1) ceased to be effective on September 13, 2004, see note 1, *supra*, the question presented lacks prospective significance.

As petitioners explain (Pet. 11), however, this Court's decision in *District of Columbia* v. *Heller*, No. 07-290 (to be argued Mar. 18, 2008), may bear on the proper disposition of petitioners' Second Amendment claim.

Heller presents the question whether certain District of Columbia gun-control statutes, and particularly the District's ban on private possession of handguns, violate the Second Amendment. The Court's decision in that case may clarify the Second Amendment principles that govern legislative efforts to ban or regulate categories of firearms that are determined to pose a particular danger of criminal misuse. The petition for a writ of certiorari therefore should be held pending this Court's decision in *Heller* and then disposed of accordingly.

2. Petitioners contend (Pet. 11-20) that an unconstitutional search and seizure occurred when the officers who first discovered the Uzi, Maadi, and FAL firearms took those weapons to Agent Vasquez (who was present at the scene) so that Agent Vasquez could determine whether those weapons were illegal. That claim lacks merit and does not warrant this Court's review.

a. Under the "plain view" doctrine, law-enforcement officers may seize private property without a warrant if the officers are lawfully in a position where they can view an object, the object's incriminating character is "immediately apparent," and the officers have a lawful right of access to the object. *Minnesota* v. *Dickerson*, 508 U.S. 366, 375 (1993). "An example of the applicability of the 'plain view' doctrine is the situation in which the police have a warrant to search a given area for specified objects, and in the course of the search come across some other article of incriminating character." *Horton* v. *California*, 496 U.S. 128, 135 (1990) (quoting *Coolidge* v. *New Hampshire*, 403 U.S. 443, 465 (1971)

(opinion of Stewart, J.)) (internal quotation marks omitted). Petitioners do not dispute that the searching officers in this case were lawfully in a position to view the Uzi, Maadi, and FAL firearms, or that the officers had a lawful right of access to those weapons. Rather, petitioners contend that the incriminating character of the firearms was not "immediately apparent" within the meaning of this Court's decisions because the officers who first observed the guns did not know whether they were unlawful.

Under this Court's "plain view" decisions, an item's incriminating character is "immediately apparent" if officers who observe the object have probable cause to believe that it is illegal. See *Dickerson*, 508 U.S. at 375; *Horton*, 496 U.S. at 142; *Arizona* v. *Hicks*, 480 U.S. 321, 326 (1987). And in determining whether the requisite probable cause exists, a reviewing court considers the *collective* knowledge of the searching officers on the scene. See, *e.g.*, *United States* v. *Waldrop*, 404 F.3d 365, 369-370 (5th Cir. 2005); *United States* v. *Wells*, 98 F.3d 808, 810 (4th Cir. 1996); *United States* v. *Menon*, 24 F.3d 550, 561-562 (3d Cir. 1994); *United States* v. *Newton*, 788 F.2d 1392, 1395 (8th Cir. 1986). Thus, when several agents search a residence pursuant to a warrant, an item's incriminating character may be "immediately apparent" even though the first officer who sees the item does not instantly recognize its illicit nature, so long as the officers ultimately make a valid collective judgment that there is probable cause to seize the item. See *Menon*, 24 F.3d at 561-563; *United States* v. *Garces*, 133 F.3d 70, 75-76 (D.C. Cir. 1998); *United States* v. *Johnston*, 784 F.2d 416, 419-421 (1st Cir. 1986). A contrary rule, under which the probable cause determination depended upon the level of expertise of the first

officer to observe a particular item, would impede efficient investigative practices to no good purpose, by leading police to designate the most knowledgeable officer to do all the searching, or to have multiple officers search the entire area. See *Menon*, 24 F.3d at 563.

b. Petitioners' reliance (Pet. 13-14) on *Hicks* is misplaced. In *Hicks*, a police officer entered a residence without a warrant and then moved a stereo turntable as part of his investigation. 480 U.S. at 323. By moving the turntable, the officer was able to observe its serial number, which had previously been concealed from view, and was ultimately able to ascertain that the turntable was stolen. *Ibid.* This Court held that the movement of the turntable was a search because it "exposed to view concealed portions of the apartment or its contents," *id.* at 325, and that the search was not justified by the "plain view" doctrine because the officer lacked probable cause (until he observed the serial number) to believe that the item was incriminating, *id.* at 326-327.

Petitioners suggest (Pet. 14) that the movement of the three firearms by the officers who initially discovered them was analogous to the movement of the turntable in *Hicks*. Unlike the movement of the turntable in *Hicks*, however, the officers' movement of the firearms in this case was not intended to reveal information about the weapons that had previously been concealed from view, and there is no evidence that the officers' conduct had that effect. Rather, the officers moved the firearms in order to facilitate their inspection by Agent Vasquez, who was on the scene precisely because of his greater

technical expertise, and who "immediately determined that the firearms were illegal." Pet. App. 4a.[2]

The Court in *Hicks* did not address the question whether the transfer of items from one searching officer to another is permissible in this situation. Other courts of appeals that have confronted that question, however, have held (like the Fourth Circuit in this case) that an officer who first observes a potentially incriminating item while executing a search warrant may take the ob-

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[2] Petitioners contend (Pet. 19) that "[t]he 'incriminating character' of the three firearms was * * * not 'immediately apparent' to Vasquez" because (1) Agent Vasquez removed the top cover of the Uzi in order to confirm "that there was no block welded to the interior wall" (meaning that the Uzi was capable of automatic fire), (2) Agent Vasquez was not shown to have been aware that the Uzi was not lawfully registered in the National Firearms Registration and Transfer Record (NFRTR), and (3) Agent Vasquez could not immediately determine whether the Maadi and FAL rifles had been lawfully possessed before September 13, 1994 (in which case former Section 922(v)(1) would not have barred their continued possession). Those arguments lack merit. Agent Vasquez testified that he immediately noticed "grind marks on the side of the [Uzi] receiver," from which he inferred that "the block inside the receiver had been removed." C.A. Supp. App. 91; see *id.* at 47, 52. That observation gave Agent Vasquez probable cause to believe that the Uzi was a machinegun, and he then properly opened the top cover to confirm that conclusion. See *id.* at 52, 91-92; cf. *Hicks*, 480 U.S. at 326 (explaining that, if the police have probable cause to seize an item found in "plain view," they can also conduct a "closer examination" amounting to a search). Similarly with respect to petitioners' other two points, the mere possibility that one or more of the three firearms fell within a statutory exception to the general bans on possession of machineguns and semiautomatic assault rifles would not negate the existence of probable cause. Moreover, the government's affidavit in support of the warrant application specifically noted that the affiant had caused a search of the NFRTR to be conducted and that the search had revealed no firearms registered to Kelly or his company. See C.A. Supp. App. 38.

ject to another officer or officers so that the group can make a collective judgment as to the presence or absence of probable cause. See *Garces*, 133 F.3d at 74; *Menon*, 24 F.3d at 560-562; *Johnston*, 784 F.2d at 419-421. Petitioners' contention that all movement of the relevant items was proscribed is particularly unavailing under the circumstances of this case. The warrant authorized seizure of "[a]ll MKS M-14 receivers and all MKS M14A1 receivers *and/or firearms utilizing the aforementioned receivers*." Pet. App. 4a (emphasis added; brackets in original). Execution of the warrant therefore necessarily required the searching officers to conduct the examination necessary to determine whether each of the firearms they discovered possessed the type of receiver referenced in the warrant.[3]

c. Even if the movement of the three firearms to facilitate their inspection by Agent Vasquez had been an unlawful search or seizure, suppression of those items at Kelly's trial would still have been inappropriate. Rather than carry the firearms to Agent Vasquez, the officers might have brought Agent Vasquez to the firearms to

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[3] In addition, officers executing a search warrant have substantial authority to take ancillary measures to protect their own safety during the conduct of the search. See *Muehler* v. *Mena*, 544 U.S. 93, 100 (2005) (holding that individuals were permissibly detained in handcuffs for between two and three hours to prevent threats to officer safety during the execution of a search warrant); cf. *Maryland* v. *Buie*, 494 U.S. 325, 334 (1990) (holding that officers carrying out an arrest may conduct a protective sweep of adjoining areas from which an attack might be launched). Based on that rationale, the officers in this case might have inspected the firearms they found and/or moved those guns to a secure location within Kelly's residence in order to guard against their misuse by outsiders during the conduct of the search, even after verifying that particular weapons were not subject to seizure under the terms of the warrant.

allow him to verify that the weapons were illegal, at which point the guns could lawfully have been seized. Any constitutional violation in the agents' movement of the guns therefore was not the cause of the ultimate seizure. For that reason, suppression of the weapons would have been inappropriate even if a Fourth Amendment violation had occurred. See *Hudson* v. *Michigan*, 126 S. Ct. 2159, 2164 (2006) (explaining that "but-for causality is * * * a necessary * * * condition for suppression"); cf. *Menon*, 24 F.3d at 561 (noting that officer to whom potentially suspicious documents were brought might have acquired the same information by inspecting the documents at the location where another officer found them).

d. Contrary to petitioners' contention (Pet. 14-18), no circuit conflict exists on the question presented here. In *United States* v. *Szymkowiak*, 727 F.2d 95, 96 (6th Cir. 1984), state police officers executing a search warrant for jewelry and a television found a firearm. Because the officers were unable to determine whether the firearm was legal, they called a BATF agent, who arrived at the scene approximately 30 minutes later. *Ibid.* Based on the BATF agent's view that the firearm probably violated state law, the state agents seized the firearm. *Ibid.* The Sixth Circuit held that the firearm should have been suppressed. See *id.* at 99.

Petitioners rely (Pet. 15) on the Sixth Circuit's statement that the incriminating character of the firearm was not "immediately" apparent because "the executing officers who discovered the weapon could not '*at the time*' of discovery determine whether its possession was unlawful." *Szymkowiak*, 727 F.2d at 99 (quoting *United States* v. *Gray*, 484 F.2d 352, 356 (6th Cir. 1973), cert. denied, 414 U.S. 1158 (1974)). In *Szymkowiak*, however,

the BATF agent was not part of the original search team, and he arrived at the scene approximately 30 minutes after the searching officers had found the gun. The Sixth Circuit accordingly had no occasion to address the situation presented here, where the law enforcement officer who immediately recognized the firearms' incriminating nature accompanied the other searching officers to provide technical expertise and was on the scene when the firearms were first discovered.[4]

Petitioners' reliance (Pet. 15-16) on *Shamaeizadeh* v. *Cunigan*, 338 F.3d 535 (6th Cir. 2003), cert. denied, 541 U.S. 1041 (2004), is likewise misplaced. Petitioners rely on the statement in *Shamaeizadeh* that an "item is not immediately incriminating" if "further investigation is required to establish probable cause as to its association with criminal activity." *Id.* at 555 (quoting *United States* v. *McLevain*, 310 F.3d 434, 443 (6th Cir. 2002)). As in *Szymkowiak*, however, the court was not presented with a situation in which the only "further investigation" necessary to verify an item's incriminating character was to show an object found in plain view to a fellow officer with greater technical expertise. The decision in *Shamaeizadeh* therefore has no meaningful bearing on the question presented here.

The other court of appeals decisions cited by petitioner (Pet. 16-18) are likewise inapposite. In *United States* v. *Brown*, 79 F.3d 1499 (7th Cir.), cert. denied, 519 U.S. 875 (1996), the court held that a police officer's

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[4] In addition, the language on which petitioners rely was not essential to the outcome in *Szymkowiak*, since the Sixth Circuit also concluded that even the BATF agent lacked probable cause for a seizure. See 727 F.2d at 99. The court's statement that the incriminating nature of the firearm was not apparent to the officers who initially found it was simply an alternative ground for the court's decision. See *ibid.*

seizure of a gun could not be justified under the "plain view" doctrine because the officer recognized the item only as a "shiny chrome metal object of some kind," and not as a firearm, until he searched a privately-owned vehicle to ascertain the object's true nature. See *id.* at 1509. In *United States* v. *Tucker*, 305 F.3d 1193, 1202-1203 (10th Cir. 2002), cert. denied, 537 U.S. 1223 (2003), the court upheld the seizure of a computer under the "plain view" doctrine. Neither of those decisions addressed the question whether, or under what circumstances, one member of a searching team may show a suspicious object to another officer on the team who can better assess its incriminating character.

The District of Columbia Circuit's decision in *Garces* (see Pet. 17-18) is also unhelpful to petitioners. In *Garces*, the court *rejected* the proposition that an item's illicit character must have been recognizable "at the precise moment [the searching officers] first spotted it" in order for the "plain view" doctrine to apply. 133 F.3d at 75 (emphasis omitted). The court explained that, "although the phrase 'immediately apparent' sounds temporal, its true meaning must be that the incriminating nature of the item must have become apparent, in the course of the search, without the benefit of information from any unlawful search or seizure." *Ibid.* Because Agent Vasquez immediately recognized the illicit nature of the Uzi, Maadi, and FAL firearms, without the benefit of any information obtained through an antecedent search of the weapons, *Garces* supports the government's position rather than that of petitioners. See Pet. App. 6a-7a.

3. Petitioners contend (Pet. 20-24) that former Section 922(v)(1) exceeded Congress's authority under the Commerce Clause because its ban on possession of semi-

automatic assault weapons encompassed non-economic activity. Relying in part on the District of Columbia Circuit's decision in *Navegar, Inc.* v. *United States*, 192 F.3d 1050 (1999), cert. denied, 531 U.S. 816 (2000), the court of appeals rejected that challenge. See Pet. App. 7a-8a. This Court denied review in *Navegar* (at a time when Section 922(v) was still in force), and there is no reason for a different result here.

The 1994 amendments to the Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 1213, restricted the manufacture, transfer, and possession of specified weapons. 18 U.S.C. 922(v). Congress sought to prevent interstate commerce in the prohibited firearms by "impos[ing] criminal liability for those activities which fuel the supply and demand for such weapons." *Navegar*, 192 F.3d at 1058. And as the legislative history of the Gun Control Act of 1968 and the 1994 amendments demonstrates, federal regulation of firearms (including assault weapons) has been based in large part on evidence that the nationwide market for firearms renders purely local prohibitions ineffective. *Id.* at 1058-1060.

There is consequently no basis for petitioners' contention (Pet. 21-22) that former Section 922(v)(1) was an invalid regulation of non-economic activity. While it was in effect, Section 922(v)(1) imposed an absolute prohibition on the sale of specified firearms, and that prohibition directly affected volume and price. The fact that the statute served non-economic ends (protection of the public health and safety) as well did not render it an invalid exercise of Congress's Commerce Clause powers. See *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U.S. 241, 257 (1964) (Congress may use its Commerce Clause authority to "legislat[e] against moral wrongs" as long as the regulated activity also has the requisite

nexus to interstate commerce.); *Mulford* v. *Smith*, 307 U.S. 38, 48 (1939) ("The motive of Congress in exerting the [commerce] power is irrelevant to the validity of the legislation.").

Contrary to petitioners' suggestion (Pet. 20-22), this Court's decision in *Gonzales* v. *Raich*, 545 U.S. 1 (2005), strongly supports the court of appeals' ruling in this case. The Court in *Raich* held that application of the federal controlled-substances laws to intrastate growers and users of marijuana for medical purposes was a valid exercise of congressional authority under the Commerce Clause. The Court in *Raich* reaffirmed that "Congress can regulate purely intrastate activity that is not itself 'commercial,' * * * if it concludes that failure to regulate that class of activity would undercut the regulation of the interstate market in that commodity." *Id.* at 18.

Petitioners' reliance (Pet. 20-22) on *United States* v. *Lopez*, 514 U.S. 549 (1995), and *United States* v. *Morrison*, 529 U.S. 598 (2000), is likewise misplaced. In holding that the civil-damages provisions of the Violence Against Women Act of 2000, Pub. L. No. 106-386, Div. B, 114 Stat. 1491, exceeded Congress's authority under the Commerce Clause, the Court in *Morrison* concluded that "[g]ender-motivated crimes of violence are not, in any sense of the phrase, economic activity." *Morrison*, 529 U.S. at 613. The Gun-Free School Zones Act of 1990, Pub. L. No. 101-647, § 1702, 104 Stat. 4844 (GFSZA) at issue in *Lopez* was held to have "nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms." 514 U.S. at 561. Nor did the restrictions in *Morrison* or *Lopez* form "an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regu-

lated." *Ibid.* The GFSZA simply outlawed the possession of a firearm in the vicinity of a school building, and did not form part of a broader regulatory scheme. The restriction imposed a geographic limit on the possession of guns that might otherwise be freely manufactured, sold, and possessed in interstate commerce.

By contrast, as the decision in *Raich* makes clear, legislative measures designed to suppress the national market in a particular article of commerce are legitimate exercises of Commerce Clause authority, even as applied to conduct (*e.g.*, possession of the item by the ultimate recipient) that may be undertaken for non-economic motives. Thus, the courts of appeals have consistently rejected Commerce Clause challenges asserted by individuals convicted of illegal possession of a machinegun. See *United States* v. *Franklyn*, 157 F.3d 90, 93-96 (2d Cir.), cert. denied, 525 U.S. 1027 (1998), and 525 U.S. 1112 (1999); *United States* v. *Wright*, 117 F.3d 1265, 1269-1271 (11th Cir.), cert. denied, 522 U.S. 1007 (1997); *United States* v. *Knutson*, 113 F.3d 27 (5th Cir. 1997); *United States* v. *Rybar*, 103 F.3d 273, 283 (3d Cir. 1996), cert. denied, 522 U.S. 807 (1997); *United States* v. *Kenney*, 91 F.3d 884 (7th Cir. 1996); *United States* v. *Beuckelaere*, 91 F.3d 781 (6th Cir. 1996); *United States* v. *Rambo*, 74 F.3d 948 (9th Cir.), cert. denied, 519 U.S. 819 (1996); *United States* v. *Wilks*, 58 F.3d 1518 (10th Cir. 1995).[5] Congress's au-

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[5] In *United States* v. *Stewart*, 348 F.3d 1132, 1134-1142 (9th Cir. 2003), the court of appeals held that the machinegun ban contained in 18 U.S.C. 922(*o*) was unconstitutional as applied to the defendant's homemade machineguns. This Court granted the government's petition for a writ of certiorari, vacated the Ninth Circuit's judgment, and remanded for further consideration in light of *Raich*. See *United States* v. *Stewart*, 545 U.S. 1112 (2005). On remand, the court of appeals held

thority to regulate in this area is particularly clear with respect to petitioner Kelly, who manufactured and transferred the proscribed firearms as part and parcel of an ongoing commercial enterprise.

4. Petitioners contend (Pet. 24-29) that the district court erred in granting summary judgment for the United States, based on Agent Vasquez's expert testimony, in the government's in rem action for forfeiture of the seized MKS M-14A firearms. That claim lacks merit.

Section 922(*o*) of Title 18 generally prohibits the private possession of a "machinegun." The term "machinegun" is defined as a firearm that "shoots, is designed to shoot, or can be readily restored to shoot, automatically more than one shot, without manual reloading, by a single function of the trigger." 26 U.S.C. 5845(b). The Fourth Circuit's decision in this case accords with rulings of two other courts of appeals, which have upheld grants of summary judgment for the government in civil forfeiture actions concerning MKS M-14A firearms manufactured by petitioner Kelly, based in part on Agent Vasquez's expert testimony. See *United States* v. *TRW Rifle 7.62X51MM Caliber*, 447 F.3d 686, 688-693 (9th Cir. 2006); *United States* v. *One TRW Model M14, 7.62 Caliber Rifle*, 441 F.3d 416, 419-425 (6th Cir. 2006).

In concluding that the MKS M-14As could be "readily restored" to automatic firing capability, the court of appeals focused on whether the firearms could be restored by a person with relevant technical expertise, not on whether an "ordinary person" would be capable of performing the task. Pet. App. 12a. Petitioners

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that Section 922(*o*) was constitutional as applied and accordingly affirmed Stewart's convictions. *United States* v. *Stewart*, 451 F.3d 1071, 1073-1078 (9th Cir. 2006).

contend (Pet. 25) that the court's construction of the phrase "readily restored" conflicts with this Court's decision in *Chicago* v. *Morales*, 527 U.S. 41 (1999). Petitioners' reliance on *Morales* is misplaced.

The Court in *Morales* reconfirmed the general principle that a criminal statute may be unconstitutionally vague if it fails to "provide the kind of notice that will enable ordinary people to understand what conduct it prohibits." 527 U.S. at 56. When a statute is alleged to be impermissibly vague, the constitutional inquiry thus focuses on whether "ordinary people" are able to comprehend the relevant criminal prohibition, not on whether "ordinary people" are capable of engaging in the primary conduct to which the statute refers. As the court of appeals recognized, "because semiautomatic weapons are complex instruments, any restoration for automatic firing will necessarily require some degree of experience or expertise." Pet. App. 12a. In light of that fact, persons of ordinary intelligence would understand the phrase "readily restored" in 26 U.S.C. 5845(b) to refer to the potential for restoration by a person knowledgeable in the field, not by an unschooled individual.

Petitioners further contend that "[t]he term 'restored' perforce means that an object was previously in a particular condition and has been returned to that previous condition" (Pet. 28), and that "[t]he process undertaken by Vasquez was not a restoration, but a conversion" (Pet. 29 n.9). As the Ninth and Sixth Circuits have recognized, that argument overlooks the fact that MKS M-14A firearms are manufactured out of parts from M-14 machineguns, which are capable of automatic fire. See *TRW Rifle 7.62X51MM Caliber*, 447 F.3d at 691-692; *One TRW Model M14, 7.62 Caliber Rifle*, 441 F.3d at 425. For that reason, the modification process that

Agent Vasquez demonstrated constitutes "restor[ation]" of the weapons to automatic firing capability within the meaning of 26 U.S.C. 5845(b).

CONCLUSION

With respect to the first question presented, the petition for a writ of certiorari should be held pending this Court's decision in *District of Columbia* v. *Heller*, No. 07-290 (to be argued Mar. 18, 2008), and then disposed of as appropriate in light of that decision. In all other respects, the petition should be denied.

Respectfully submitted.

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